details of these shocking and frightful crimes available to news media, after which venue was changed.

(3) January 31, 1974 to June 30, 1974 - Transfer of trial to San Antonio and pre-trial proceedings in Bexar County. (This is the period which appellant now complains that the court kept from further publicity expansion by postponing until after trial some of appellant's ancillary hearings.)

(4) July 1, 1974 to July 9, 1974 - Jury selection.

(5) July 9, 1974 to July 16, 1974 - Trial

Assuming appellant's selection of news stories from his exhibits is representative, it shows that, had Judge Dial not used his discretionary power to so group ancillary matters as to prevent the pre-trial snowballing effect of news stories, such coverage, according to appellant's theory, could have prevented trial anywhere, in the reasonably foreseeable future.

TOTAL PAGES	TIME PERIOD	PAGES OF STORIES IN APPELLANT'S BRIEF (BY PAGE NUMBERS IN HIS BRIEF)
4	1. Aug. 9, 1973 to Jan., 1974	pp. 22-25 inclusive (4)
27	2. Jan. 13, 1974 to Jan. 30, 1974	pp. 26-33 inclusive (8)
	3. Jan. 31, 1974 to June 30, 1974	pp. 34-45 inclusive (12) pp. 54-60 inclusive (7)
18	4. July 1, 1974 to July 9, 1974	pp. 46-53 inclusive (8) pp. 61-67 inclusive (7)
	5. July 9, 1974 to July 16, 1974	pp. 68-70 (3)

The television script coverage which appellant selects from his exhibits and shows at pages 71-74 of his brief, in terms of his time periods are as follows:

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TOTAL SCRIPTS	TIME PERIOD	NUMBER OF SCRIPTS
26	1. Aug. 9, 1973 to Jan., 1974	26 (none in Oct., Nov. or Dec.)
40	2. Jan. 13, 1974 to Jan. 31, 1974	23 (Houston pre-trial)
	3. Feb. 19, 1974 to June 30, 1974	17 (San Antonio pre-trial)
20	4. July 1, 1974 to July 8, 1974	9 (Jury selection period)
	5. July 9, 1974 to July 16, 1974	11 (Trial)

In his excerpts from television broadcasts (pages 75 to 84 of his brief) appellant includes only two very brief notes during the time period from January 13, 1974 to January 31, 1974, when the multitude of facts about the murders was made available to news media from the defense witnesses at the motion to suppress. These, however, are quite significant. They are at page 77 of his brief as follows:

> January 23, 1974, Newswatch at 10:00 p.m.:
> "Defense lawyers in trial of alleged sex-ring killer Elmer Wayne Henly (sic) have called for Houston newsmen to testify * * *."
>
> January 30, 1974, Newswatch at 10:00 p.m.:
>
> "District Judge William Hatten today ordered the trial of accused mass murder (sic) Elmer Wayne Henley moved from Houston because of excessive pre-trial publicity * * *. The 17 year old Henley is charged with six of 27 sex-torture murders of young men over year-old (sic) Elmer Wayne Henley, 18-year old David Owen Brooks, and 33-year old Dean Arnold Corll. Henley and Brooks have been charged in connection with the sadistic sex murders of the 27 boys and led police to the bodies. * * *."

At page 85 of his brief appellant shows the following examples of radio coverage, by months:

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MONTH	WIRE STORIES	REWRITES
August, 1973	76	8
September, 1973	11	5
October, 1973	10	1
November, 1973	1	0
December, 1973	1	2
January, 1974	65	12
February, 1974	26	11
March, 1974	1	0
April, 1974	53	73
May, 1974	10	12
June, 1974	5	7
July, 1974	88	130

Again, the flux of pre-trial coverage is seen to be concurrent with pre-trial handling of matters ancillary to the trial, handled thus at the urging of the defense.

It can easily be seen that the perfectly legal use by the defense of pre-trial ancillary procedures was used in Houston with a result of working a delay in trial there, together with a change of venue, and wisdom required that Judge Preston Dial, judge of the District Court, 175th Judicial District in Bexar County, find ways to prevent a recurrance of this effect in Bexar County.

This the court did by allowing full development of all ancillary matters, but not allowing all of them before trial.

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PREJUDICE NOT SHOWN

Appellant takes the position, without expressly saying so that the news coverage of the crimes here involved is per se prejudicial.

This is not correct.

There is not, in the items selected by appellant at pages 23 to 84 of his brief, a single editorial condemning appellant.

The only editorial presented is at page 35 of appellant's brief, and primarily complains of the removal of the venue to Bexar County. There is no mention of appellant except "Elmer Wayne Henley, a defendant in the Houston mass murder case, will be tried here."

The news stories are as calmly informative as is possible when the crimes themselves are blood chilling in their nature.

Primarily they deal with announcements of pre-trial hearings, and reports of evidence there given.

These included the bereaved parents in the audience at the Houston hearing (p. 32 of appellant's brief). There are statements that Henley is charged in six of the killings, with the exculpatory note that they were allegedly inspired by his mentor, Dean Corll (News, January 30, 1974, p. 33 of appellant's brief).

There are quotations in April 5 to 8, 1974, stories (pp. 39-40 of appellant's brief) of announcements by appellant's lawyers of attempts to further delay the trial.

There is coverage of the removal of additional cases

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to San Antonio, with further stories on his lawyers' announcements (pages 42-43 of appellant's brief).

There is coverage on appointment of local counsel to aid Henley, coupled (by the News, May 31, 1974, p. 45 of appellant's brief) with announcement of acquittal of appellant's father on an assault to murder charge.

The News, on July 1, 1974, wrote (P. 46 of appellant's brief):

> "Mrs. Henley beamed at her own 18-year-old, Elmer Wayne Henley, as he took a seat in the courtroom. . ."

Certainly, this is not an indication of a population with a prejudice against the defendant Henley.

The mere publishing of informative news stories such as these, simply does not per se require a change of venue.

See Bridges v. State, 471 S.W.2d 827, decided in 1971 in the light of Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663, Estes v. Texas, 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed.2d 543, and Pamplin et al v. Mason, 364 F.2d 1.

There were newspaper clippings before the court in the Bridges case, which was an L.S.D. sales case. These clippings depicted undercover anti-narcotics activities of an attractive 22-year old housewife, an Amarillo officer, who posed as a high school student to ferret out narcotics violations. She drew a favorable press, and the defendant in that case was both mentioned and pictured in some of these articles. There, as here, the Court held the question of venue in abeyance during the jury selection.

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There was held no error in overruling the motion to change venue.

In Enriquez v. State, 429 S.W.2d 141, also decided in the light of recent federal cases, the Court of Criminal Appeals had, as here, a record of the voir dire, which there was 1500 pages long. Here it extends from R. 787 to R. 2219, a total of 1432 pages.

Enriquez was a capital case, with separate juror voir dire. In the case at bar, no death penalty was possible, but the court nevertheless granted the defense request for separate jury voir dire.

In Enriquez the Court states, 429 S.W.2d 141 at 143:

> Though a number of veniremen were excused because they stated at one stage of their examination that they had an opinion as to appellant's guilt, a careful examination of the approximately 1500 pages relating to the jury selection reveals that the trial court in this case exercised extreme caution and excused many of the venire, who under usual and accepted practice whould have been selected, because their opinions were uncertainly formed and the prospective jurors stated that they felt they could set aside any opinions they might have formed and try the case purely on the evidence adduced from the witness stand.

In the case at bar, appellant states at page 85 of his brief, 64 out of 124 prospective jurors questioned were excused because they had formed an opinion as to the guilt or innocence of the defendant.

Some answers were,as appellant details at page 86 of his brief, sufficiently vague that there could be a question as to their applicability.

These figures of the defense, as far as they go, are

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schematically correct. But they stop short of the significant facts.

These facts are:

(1) One juror, Tony De La Zerda, was excused because he had already decided appellant was not guilty (R. 1332).

(2) Very few of the venirepersons excluded said whether they had reached a conclusion of guilt or one of innocence. A summary of voir dire, which follows, shows pages of the record applicable as to each venireperson questioned.

(3) Where the venireperson's answer was not clear, the tendency was for prompt excusal, e.g., Felipe L. Rodriguez (R. 1366).

(4) Virtually no time was spent by the State in attempts to rehabilitate venirepersons. This is shown by the fact that only six times, out of 124 persons voir dired, was there re-examination by the State, after the defense had finished its examination.

Of the six venirepersons re-examined by the State, two, Claude Guerro (R. 849, R.864), and Zelma Lee Bailey (R. 1708, R. 1727) were excused. The other four venirepersons are Walton H. Theiss (R. 824, 844), Myrtle Garner (R. 1020, R. 1035), Myron Donelly (R. 1072, R. 1094), and Billie R. Rock (R. 1539, R. 1569).

In none of these re-examinations, the record pages being above listed, was there any showing of prejudice of opinion from pre-trial publicity.

Examples of the lack of community prejudice against appellant, shown by voir dire, include the following:

Rudolph Rivera (R. 1630) - He had read little about the case. He is a sports fan and reads sports news (R. 1646).

Mrs. Fredarica M. Parra - She simply did not know the facts of the case at all (R. 1657).

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Mrs. Zelma Lee Bailey (R. 1708) - Had no opinion on the case. She was a [redacted] with economic problems, and would not get paid while she served and was excused by agreement on suggestion of defense counsel because of this hardship (R. 1727).

Justin A. Schleper (R. 1729) - He had read or heard "very slightly" about the case.

John Longoria (R. 2146) - He first said he had no opinion which would influence his decision (R. 2146). Later, on questioning by the defense, he changed his position (R. 2155-56). He was excused with no state effort made to rehabilitate him.

Here the more than 1400 pages of voir dire presents a San Antonio cross-section and it clearly is one without any vindictiveness to appellant.

The case at bar is not such a case as Richardson v. State, 70 S.W.2d 1003 at 1004, which was reversed. There the trial judge reserved his ruling on change of venue until the jurors had been examined. There the opinion noted these figures:

86 jurors appeared
5 excused by agreement
10 secured out of the 81 left
21 more summoned
13 of these disqualified because of opinions as to guilt
1 more juror secured
5 more summoned - all disqualified because of opinions as to guilt
5 more summoned
3 disqualified because of opinion as to guilt
1 more chosen

In the Richardson case, practically all had heard the case discussed, 68 had an opinion as to guilt, a number had heard others condemn defendant; sentiment was against him

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and against the offense he was charged with having committed (murder).

In Richardson the offense (murder of defendant's son) was committed January 1, 1934. The indictment was returned January 4, 1934. Trial was January 15, 1934. And in the meantime, the case had wide publicity, with details of the offense, in the county of its commission. It was uncontested that sentiment against defendant was bitter.

Those simply are not the circumstances here, where there was a continuance and a change of venue from the county of the crimes, on the court's own motion, and a lack of any showing of bitterness.

Here, the comparable case is Pugh v. State, 186 S.W. 2d 258 at 260, which was affirmed, after a review of voir dire proceedings.

There 100 veniremen were summoned, 56 were examined, nine had conscientious scruples, 16 had formed an opinion, four were peremptorily challenged by the State, fifteen were peremptorily challenged by the defense, twelve were selected for the jury.

In the case at bar, 32 persons had to be selected, because peremptory strikes were not taken individually.

The appellant has the burden of showing prejudice, Pugh v. State, 186 S.W.2d 258, 260.

Jolley v. State, 363 S.W.2d 269 teaches us this must be prejudice other than a prejudice against the type of crime committed, Ward v. State, 427 S.W.2d 876, 881, holds that

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newspaper publicity alone does not establish prejudice or require a change of venue.

(VENUE AND CONTINUANCE HEARINGS)

In the case at bar, appellant complains because the court did not, in a pre-trial hearing, have a public rehash of the previous pre-trial publicity.

What the court did, after it was too late for more stories to make selection of a jury impossible, was to allow the defense to put on anything it wished in an effort to show there had been a need for a change of venue to give the defendant a fair trial before an impartial jury.

Not a single compurgator was called by the defense. Not a single witness testified as to any community prejudice against defendant. All that was proved was that there had been day to day attention by news media to pre-trial proceedings, with factual stories informing the public as to what was happening, and that this total got bigger as the trial was delayed in favor of pre-trial ancillary hearings.

Appellant takes the position throughout his argument that a pre-trial hearing is necessary on change of venue to enable an appellate court to determine whether there has been an abuse of discretion resulting in a deprivation of the right to a fair trial by an impartial jury. See page 100 of his brief. He claims the hearing at R.3491-3506 on motion for new trial and bills of exception (R. 3491) was merely curative (see p. 104 of appellant's brief).

This was the chance the court had promised for the defense to show by bill of exception any prejudice making unlikely a fair trial by an impartial jury.

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It is only sensible, if it will not be likely to itself defeat justice, for a change of venue hearing to be held before trial, to avoid the waste of time and money if a change of venue is shown necessary. Here, it would have been patently an exercise in futility to cause the same kind of publicity permeation of the new trial community, i.e., Bexar County, which had occurred in the first, i.e., Harris County. Thus it was only sensible to allow this proof after the trial was over, as was done by the wise trial judge.

The diligence with which appellant's counsel proceeded throughout makes it patent that proof of bitterness and vindictiveness and other indicia of prejudice specially or generally in the community, would have been shown if such evidence had existed.

There are annotations on pre-trial publicity in criminal cases as ground for change of venue at 10 L.Ed.2d 1243 to 1306 and at ALR 3d 17-148 (supplemented at pages 3-16 of the 1975 pocket parts.) One case cited in the ALR 3d annotation is Handy v. State, 138 S.W.2d 541, which was a Texas death penalty murder case.

The Handy case, 138 S.W.2d 541 at 548-549, points out the fact that no two change of venue cases are alike and each must be decided on its own facts.

It is respectfully submitted that under the facts of the case at bar, where after the first burst of publicity was over, the defense saw no need to change venue from the county of the offense, and subsequent pre-trial proceedings resulted in a continuance and change of venue, the trial court to which

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venue had been changed did the wise, fair and just thing when he:

(1) Held no pre-trial venue hearing,

(2) Allowed separate voir dire of venire-persons,

(3) Promptly excused all venirepersons who stated they had formed an opinion from hearsay or otherwise, which might influence their verdict as to guilt,

(4) Permitted unlimited questioning of venirepersons,

(5) Postponed his ruling on change of venue until after the necessary 32 prospective jurors were selected,

(6) Overruled motion for change of venue only after 32 venirepersons qualified as jurors,

(7) Offered to let hearsay evidence, to show prejudice, be filed,

(8) Promised ahead of time that a full bill of exception to show prejudice would be allowed later,

(9) Later did allow unlimited proof on the question of change of venue as bill of exception,

(10) At public cost had more than 1400 pages of voir dire furnished to the record to show the appellate court the play by play selection.

For convenience of the court, a chart summarizing the 1432 pages of voir dire in the record is here presented:

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VOIR DIRE SUMMARY

PAGE IN RECORD	NAME	EXEMPTED OR EXCUSED	HAS CONCLUSION WHICH WOULD INFLUENCE DECISION	HAVE READ OR HEARD OF CASE	PAGE NO. WHERE ACCEPTED
787-789	Antoinette V. Franklin (Student) *	Ex.			
788-789	Elsie Martin (Student)	Ex.			
790	Angela Martinez	Ex.			
791	Unidentified Juror (Two small children -parents out of town)	Ex.			
792	Helen M. Scheibach	Ex.			
820	Doris F. Sadesky	Ex.	Yes		
822	Bee Kitchens	Ex.	Yes		
824;828;840	Walton H. Theis		No	Yes	847
848	Theodore F. Botkin	Ex.	Yes		
849;864	Claude Guerrero (Confused by six cases)	Ex.	No	Yes TV	
865	Julie A. Carmody (Has biases - no definite conclusion)	Ex.	No	Yes	
870-882	Debra A. Boyer		No	No	888
890	George B. Kobel	Ex.	Yes		
891	James V. Vistuba (Not a conclusion affected by it)	Ex.	More than likely		
893;905	Joy K. Stulz (Haven't kept up with it; too busy on new job)		No		915

* Exempted or Excused

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VOIR DIRE SUMMARY, CONT'D

PAGE IN RECORD	NAME	EXCUSED OR EXEMPTED	HAS CONCLUSION WHICH WOULD INFLUENCE DECISION	HAVE READ OR HEARD OF CASE	PAGE NO. WHERE ACCEPTED
916;932;935	Donald K. Atnip ("He's innocent until proven guilty")		No		939
942;943;944	Patti K. Harrison (State offered to agree to excuse her reason for venue change) (In Houston a week when case broke)	Ex.	No		
946	Clifford R. Nelson	Ex.	Yes		
947	Douglas H. Rooke	Ex.	Yes		
948	Edward Hernandez	Ex.	Yes		
949	Douglas S. Drury (Haven't kept up with it very well)		No		971
973	Clarence H. Drake	Ex.	Yes		
974	Helen S. Mock		No		993
994;996;1009	Evelia L. (Trevino) Garcia (Saw nothing in yesterday's or today's paper)		No		1015
1017	La Verne F. Church	Ex.	Yes	Yes	
	Juan M. Castillo ("Sir, I find the defendant guilty")	Ex.	Yes		
1019	Geraldine Besecker	Ex.	Yes		
1020;1029;1030	Myrtle H. Garner (Read nothing about the case yesterday or today) (Have not formed an opinion)		No		1037

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VOIR DIRE SUMMARY, CONT'D

PAGE IN RECORD	NAME	EXCUSED OR EXEMPTED	HAS CONCLUSIONS WHICH WOULD INFLUENCE DECISION	HAVE READ OR HEARD OF CASE	PAGE NO. WHERE ACCEPTED
1048;1069	Adolph Martinez (Will consider five years)		No		1071
1072;1084;1085	Myron J. Donnelly (Has not heard anything about the so-called facts of the case		No		1099
1101	Rosa Belle Lamb	Ex.	Yes		
1102;1103	Harold D. Payne (Excused by agreement because of employment	Ex.	No		
1104	Grace H. Nixon who lives near Houston. "I was there to read and see."	Ex.	Yes	Yes	
1105	Carole K. Phillips (Equivocal but State did not object to challenge)	Ex.	Yes		
1108;1117;1120	Pearlie M. Stafford (Defense challenges for cause. She can't sit in judgment and find guilty or not guilty)	Ex.			
1121;1128	Mrs. Berry W. Langford (From Houston - challenge - agreed)	Ex.	No		
1129;1141;1142; 1140;1152	Alfred C. Prinz (Saw something in August Read one article Sunday Just the - no facts of case - could consider 5 years/10 years also.		No		1154

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VOIR DIRE SUMMARY, CONT'D

PAGE IN RECORD	NAME	EXCUSED OR EXEMPTED	INFLUENCE DECISION WHICH WOULD HAS CONCLUSIONS	HAVE READ OR HEARD OF CASE	PAGE NO. WHERE ACCEPTED
1155	Robert W. Miller	Ex.	Yes	Yes	
1156	Johnnie J. Ochoa, Junior	Ex.	Yes		
1157	Robert V. Guerrero	Ex.	Yes		
1158	Maria E. Mendez	Ex.	Yes		
1159	Martin Lopez	Ex.	Yes		
1160	Joe E. Olveda (Don't speak much English. Excused by agreement)	Ex.			
1161;1188;1189	Carol A. Reyna (Gray challenge. Vance did not stop with a favorable answer)	Ex.	First No Then Yes		
1191	Elidorio Vasquez (Past California experience. Excused by agreement)	Ex.	No		
1193	Mary Ann McCurdy		No		1217
1219;1220;1235; 1226	Sam A. Mask (Did not follow it closely Does not recall facts - vague-no discussion - visits penitentiaries when called)		No		1245
1246	Evelyn L. Geiger	Ex.	Yes		
1247	Janie R. Perez (Joint challenge - could not consider minimum punishment)	Ex.	No		

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VOIR DIRE SUMMARY, CONT'D

PAGE IN RECORD	NAME	EXCUSED OR EXEMPTED	HAS CONCLUSIONS WHICH WOULD INFLUENCE DECISION	HAVE READ OR HEARD OF CASE	PAGE NO. WHERE ACCEPTED
1261;1275;1278, line 5-6;1280; 1287	Clara B. Balzen (Read nothing the past Sunday - TV - Not paying that close attention. "I can eliminate everything heard and read and listen to your witnesses." Publicity has not influenced her.		No		1298
1301	Richard J. Goetz	Ex.	Yes		
1302	Martha I. Inglett (Born in Mexico, moved to San Antonion when she was 1 year old - nothing at all on what she had read or heard		No		1331
1332	Tony De La Zerda (Conclusion that def. is not guilty) (Volunteered) (Excused by agreement)	Ex.	Yes		
1334	Valerie F. Cumming (Excused by agreement)	Ex.			
1334	Santiago G. Tello, Junior (Excused by agreement) (Can't give minimum 5 years)	Ex.	No	Yes	

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VOIR DIRE SUMMARY, CONT'D

PAGE IN RECORD	NAME	EXCUSED OR EXEMPTED	HAS CONCLUSIONS WHICH WOULD INFLUENCE DECISION	HAVE READ OR HEARD OF CASE	PAGE NO. WHERE ACCEPTED
1341;1353	Dora A. Guerra News stories did not im press her) (Opinion-news-papers exaggerate)			Yes	1364
1365	Charles T. Whitehead	Ex.	Yes		
1366	Felipe L. Rodriguez, Junior ("I don't know, I can't tell you. I guess he's guilty." (No attempt made to rehabilitate him - State agrees to excuse)	Ex.	Yes		
1367	Maidee S. Cleveland	Ex.	Yes		
1368;1380;1379	Herlinda G. O'Brien (Don't remember details-read headlines only)		No	Yes	1389
1391;1417;1402; 1404	Elva M. Hoffman in the past) (Excuse by agreement not permitted) (Vance request denied) (Read when it happened-not much recently) (Read Sunday that 500 jurors had been called up - saw pictures of diggings)		No	Yes	1418
1419;1432;1431;	Rosemary D. Tull (Going to S.A.Jr.College has a lot to read)		No	Yes	1450

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PAGE IN RECORD	NAME	EXCUSED OR EXEMPTED	HAS CONCLUSIONS WHICH WOULD INFLUENCE DECISION	HAVE READ OR HEARD OF CASE	PAGE NO. WHERE ACCEPTED
1452;1474	Helen M. Green (Believe innocent until proven guilty; have only heard State's side so far)		No		1488
1490;1502-1504	Eusevio Gonzales (Have seen TV, papers when it happened-did not see Sunday paper - recently saw only that case was coming to San Antonio)		No	Yes	1515
1517	Frederick K. Braun	Ex.	Yes		
1518;1536	William R. Garretson (Will not follow law - alcohol or drugs in mitigation - State challenges for cause)	Ex.	No		
1539;1550-1551; 1532;1569;1573	Billie R. Rock (Read some news articles about the case - never got into the facts. Don't believe a whole lot of this stuff until I hear it first-hand. Defense challenged re ID of deceased - Rehabilitated		No		1579
1583	Edward H.R. Green ("I kind of lean to a conclusion") (Only fact these crimes committed)(No facts		? Then No	of case)	1626
1628	Judith A. Varga (Dr. or Miss Varga) (Nice people, don't discuss such things)	Ex.	No		

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VOIR DIRE SUMMARY, CONT'D

PAGE IN RECORD	NAME	EXCUSED OR EXEMPTED	HAS CONCLUSIONS WHICH WOULD INFLUENCE DECISION	HAVE READ OR HEARD OF CASE	PAGE NO. WHERE ACCEPTED
1630	Rudolph Rivera (Sports fan - read the sports)		No		1656
1657	Fredarica M. Parra (Don't know facts of case)		No	No	1682
1684;1696-7	John Joseph Hoog (Read headlines - no lengthy articles)		No		1705
	Donald M. Kirk	Ex.	Yes		
1707	Christopher Tarnava, Junior	Ex.	Yes		
1708;1727	Zelma Lee Bailey -not paid if absent, hardship)	Ex.	No		
1728	Milton E. Lenz	Ex.	Yes		
1729;1743-4	Justin A. Schleper (Had read very slightly about the case)		No		1754
1757	Felix Carmago, Junior	Ex.	Yes		
1758	Pat D. Carroll	Ex.	Yes		
1759	Leonora Haenel (Believed maximum sentence should be given if Defen. proven guilty)	Ex.	No		
1772	Filiberto G. Alvarado	Ex.	Yes		

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VOIR DIRE SUMMARY, CONT'D

PAGE IN RECORD	NAME	EXCUSED OR EXEMPTED	HAS CONCLUSION WHICH WOULD INFLUENCE DECISION	HAVE READ OR HEARD OF CASE	PAGE NO. WHERE ACCEPTED
1773;1779	Richard V. Carillo (Some questions as to expecting defendant to testify - excused by agreement)	Ex.	No		
1781	Mrs. R.E. Brotherman, Junior (Over 65 - claimed exemption)	Ex.			
1782	Reverand Jesse Short	Ex.	Yes		
1783;1797-1800;1808-1809	Reynaldo T. Lopez (No opinion from news stories - Defense challenge for cause - news reports overruled		No	Yes	1808
1809;1811	Lorena A. Holden (Challenged by State - ı - this could sway her)	Ex.	No		
1812;1814	Antonio L. Solis (Excused by agreement)	Ex.	No		
1815;1826-7; 1827-8	Samuel Garza, Junior (Originally had opinion defen. guilty, then thought "A lot of things I don't know")		No		1836
1837	Jesse T. Hugdins	Ex.	Yes		
1839	Elizabeth A. Simon	Ex.	Yes		

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VOIR DIRE SUMMARY, CONT'D

PAGE IN RECORD	NAME	EXCUSED OR EXEMPTED	HAS CONCLUSION WHICH WOULD INFLUENCE DECISION	HAVE READ OR HEARD OF CASE	PAGE NO. WHERE ACCEPTED
1840;1855-6	Annalee E. Wofford (Read some news accounts about a year ago-may have seen some TV a year ago-Saw nothing last Sunday or Monday)		No		1873
1881	Adeen S. McNiel (She would find defendant guilty if told of drinking or narcotics)	Ex.	No		
1897	Nella Woods Excused by agreement)	Ex.	No		
1910;1913	Gerald Martinez (Could not consider five years. Challenged by defense)	Ex.	No		
1913;1937	Ann L. Robinson . Mr. Gray:"We will use one of our challenges.")	Ex.	No		
1937	Vera Drumb Marshall	Ex.	Yes		
1938	Pedro L. Rodriguez	Ex.	Yes		
1939	Spencer W. Kiesel	Ex.	Yes		
1939	Paul Rangel	Ex.	"Some has"		

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VOIR DIRE SUMMARY, CONT'D

PAGE IN RECORD	NAME	EXCUSED OR EXEMPTED	HAS CONCLUSION WHICH WOULD INFLUENCE DECISION	HAVE READ OR HEARD OF CASE	PAGE NO. WHERE ACCEPTED
1941	Juan S. Tristan	Ex.	Yes		
1941	Alfred R. Roberts	Ex.	Yes		
1942	Walter Franklin Clarkson	Ex.	Yes		
1943	Annette Marie Knaus	Ex.	Yes		
1943	Lucinda J. Sanchez	Ex.	Yes		
1944	Richard J. Ackermann ("I don't know anything about it.")		No		1970
1971;1980	Francis S. Chichanowski (Work evenings - Don't read paper very much)		No		1993
1993	Mildred Bohach	Ex.	Yes		
1993	James H. Bell	Ex.	Yes		
1994	Antonio M. Martinez, Junior	Ex.	Yes		
1994	Mary Ann Brown	Ex.	Yes		
1995	Roy Lemaster	Ex.	Yes		
1996	Aleene Block	Ex.	Yes		

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VOIR DIRE SUMMARY, CONT'D

PAGE IN RECORD	NAME	EXCUSED OR EXEMPTED	HAS CONCLUSION WHICH WOULD INFLUENCE DECISION	HAVE READ OR HEARD OF CASE	PAGE NO. WHERE ACCEPTED
1997	Arthur Heber, Junior	Ex.	Yes		
1998;2000-7	Jim Scott Jones (What she read is not very clearly organized)		No	Yes	2026
2030	Daisy Jane Alberthal (Cl-	Ex.	No & Yes		
2034	James M. Stedman (Excused by agreement) (Claimed	Ex.			
2035;2046 et seq.	Jose G. Robledo (Had discussed case - no opinion as to defendant's guilt)		No		2059
2060;2069; 2070;2073	Edward W. Schmidt (Read about case when it happened. Has discussed it; some people expressed opinion defendant was guilty; venireperson did not. Would require State to carry burden of proof)		No	Yes	2082
2087;2093	Charles N. Stefano -followed case closely. Coffee drinking friend of defendant's atty., Rudy Esquivel. Excused by agreement)	Ex.	No		
2094	Juanita R. Mora	Ex.	Yes		

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VOIR DIRE SUMMARY, CONT'D

PAGE IN RECORD	NAME	EXCUSED OR EXEMPTED	HAS CONCLUSION WHICH WOULD INFLUENCE DECISION	HAVE READ OR HEARD OF CASE	PAGE NO. WHERE ACCEPTED
2095;2105	Willis J. Lee, Jr. (Recalled reading nothing about the case previous Sunday)		No		2117
2118;2131; 2130	Walter M. Lozano (Heard discussion of the case-does not believe what he reads or hears) (Read nothing about the case except maybe when it happened)		No	No	2142
2144	Mary M. Casillas	Ex.	Yes		
2145	Arthur R. Zunker	Ex.	Yes		
2146;2156	John Longoria (Defense challenge for cause sustained)	Ex.	First No Then maybe Says he's guilty		
2157	Raymond J. Thies	Ex.	Yes		
2158	Jesus U. Reyes	Ex.	Yes		
2159	Sylvia Griffith	Ex.	Yes		

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VOIR DIRE SUMMARY, CONT'D

PAGE IN RECORD	NAME	EXCUSED OR EXEMPTED	INFLUENCE DECISION	HAVE READ OR WHICH WOULD	HEARD OF CASE	HAVE READ OR	PAGE NO. WHERE ACCEPTED
2160;2173	Atilano Limon, Jr. (Vague answer as to effect if defendant does not testify. Challenge by defense sustained.)	Ex.	No		Yes		
2180	Anita H. Gonzales	Ex.	Yes				
2181;2194	Louis Slusser (Read no papers for 2 1/2 weeks in June-vacation)		No		Yes		2216
2218	Jim Scott Jones (H living with her)						
2219	Motion for change of venue now denied.						

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As appellant recognizes at page 131 of his brief, there is no burden upon the state to show lack of prejudice when the court does not sequester the jury. Blackwell v. State, 510 S.W.2d 952; Johnson v. State, 469 S.W.2d 581. There is no showing of any prejudice. The trial court was very careful to promptly curb any effort by news media to contact members of juror's families, and to make certain that no effort was made to contact the jurors (e.g. R. 2714 to R. 2732; R. 2888 to R. 2899), and he prohibited public statements by all lawyers in the case (R. 774).

Appellant's points of error twelve to fourteen, inclusive, are without merit.

Likewise, appellant's complaint that a group of news media people were seated in a spare jury box in no way makes applicable Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed. 2d 600.

Recently, in Murphy v. Florida, 95 S.Ct. 2031 at 2035, the United States Supreme Court distinguished the group of cases, including Sheppard, in each of which a state court conviction was overturned because of a trial atmosphere utterly corrupted by press coverage.

These cases, the court held, 95 S.Ct. 2031 at 2036, "cannot be made to stand for the proposition that juror exposure to ...news accounts of the crime with which he (the defendant) is charged alone presumptively deprives the defendant of due process."

A quite recent opinion by the United States District

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Court for Maryland, in U. S. v. Mandel, 19 Cr.L. 2034 at 2035, discusses the denial of a change of venue for several co-defendants in the trial of Maryland Governor Marvin Mandel and others indicted on mail-fraud and racketeering charges.

There the court noted that a motion for change of venue is generally granted, if at all, only after an attempt is made through voir dire to impanel an impartial jury. Exception to this rule applies only where the publicity is inherently prejudicial, by measurement against that in Irvin v. Dowd, 366 U.S. 717; Rideau v. Louisiana, 373 U.S. 723; Estes v. Texas, 381 U.S. 532 and Sheppard v. Maxwell, 384 U.S. 333, the opinion points out.

The opinion also cites U.S. v. Abbott Laboratories, 505 F.2d 565, in which the fourth circuit held that even though the publicity was prejudicial and inflamatory, the court must first resort to voir dire before dismissing the indictment, and expressed the position that voir dire can be an effective protection against prejudicial publicity.

The opinion also cites U.S. v. Chapin, 515 F.2d 1274 (C.A. Dist. of Col.), in which change of venue was denied President Nixon's appointments secretary in his trial for making false statements in re dirty tricks strategy, as well as Calley v. Calloway, 519 F.2d 184, Cert.Den. 19 Cr. L. 4001.

Here, between his careful protection of the jurors, his prohibition against lawyers discussing the case (R. 774), and his providing a space for members of the press (without cameras) to be present, the court demonstrated wisdom in balancing Sixth, Fourteenth, First Amend ment rights. See

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note at 19 Cr.L. 4017, in re Nebraska Press Assn. v. Stuart , set for argument this spring as No. 75-818 in the United States Supreme Court. (Also see 18 Cr. L. 2254) as to balancing of such rights.

Appellant's first fifteen grounds of error are without merit.

REPLY TO POINT OF ERROR SIXTEEN

Appellant here complains that the court did not quash the entire jury panel (all of the 500 called who had reported) after appellant, with his back to the jury panel, was handcuffed by deputies before he was taken out of the general assembly jury room (R. 818).

The court specified that inquiry could be made of individual venirepersons on voir dire.

Appellant now, for the first time, complains this was of no value for each juror who had not seen appellant in handcuffs would then be told he wore them.

He made no such complaint at time of trial (R. 819).

Further, appellant's counsel did make such inquiry at time of voir dire, to several venirepersons, and none of them had seen any handcuffs used, e.g., R. 840, Mr. Theis; R. 932, Mr. Atnip; R. 971, Mr. Drury.

It is to be noted that here the deputies sought to have the least possible attention to security measures which certainly cannot be called unreasonable, in transporting a defendant in a multi-murder trial.

The facts of this case are in contrast with those in

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O. D. Moore v. State, opinion of April 14, 1976, reversed because, without explanation therefor, the defendant was brought into court daily in handcuffs, to be thus reviewed by the jury as the handcuffs were removed.

There simply is no showing here of the defendant as appellant incorrectly asserts at page 1370 of his brief, being "paraded before the entire jury panel in handcuffs."

No error is shown. See Slaton v. State, 484 S.W.2d 102, opinion by Presiding Judge Onion, stating that handcuffs can be used if there is a good reason; Davis v. State, 505 S.W.2d 800, upholding the use of handcuffs to transport a prisoner. Also see Ford v. State, 502 S.W.2d 160 and Mouton v. State, 235 S.W.2d 645.

Further, when all evidence in this case is considered, it is not conceivable that had appellant been in handcuffs, while necessarily moving from one part of the courthouse to another, any prejudice could be shown. Thus it would be harmless error, if it were error. Ex Parte Slaton, 484 S.W.2d 102.

Appellant's point of error sixteen is without merit.

REPLY TO POINTS OF ERROR

SEVENTEEN TO TWENTY-TWO

Appellant here makes six specific complaints as to voir dire. These points of error read as follows (p. 138 of appellant's brief):

POINT OF ERROR NO. SEVENTEEN

> The trial court committed reversible error in curtailing appellant's voir dire of Clara Balzan, and in denying his challenge for cause.

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POINT OF ERROR NO. EIGHTEEN

The trial court committed reversilbe error in curtailing appellant's voir dire of juror Rosemary Tull, and in denying his challenge for cause.

POINT OF ERROR NO. NINETEEN

The trial court committed reversible error in curtailing appellant's voir dire of Justin Schleper, and in denying his challenge for cause.

POINT OF ERROR NO. TWENTY

The trial court committed reversible error in denying appellant's challenge for cause of juror Walton Theis.

POINT OF ERROR NO. TWENTY-ONE

The trial court committed reversible error in denying appellant's challenge for cause of Edward Green.

POINT OF ERROR NO. TWENTY-TWO

The trial court committed reversible error in curtailing appellant's voir dire of juror Billie Rock, and in denying his challenge for cause.

(CLARA BALZEN)

As to the curtailment of Clara Balzen, appellant's counsel had questioned her as to minimum punishment, of five years, with this result (R. 1290, lines 1-18):

"Q Yes, ma'am. See, first, the Jury decides whether the defendant is guilty or innocent. And, let's say, in this hypothetical case, you had retired with your fellow Jurors and you voted to find the defendant guilty of the offense of murder with malice aforethought. Then either side, after that, can put on further evidence, on the issue of punishment. And then the Jury retires again to determine the punishment to be assessed. Now, let's say that you have done all this, you have found the defendant guilty of the offense of murder with malice aforethought. My question is this: when you go back to the Jury Room, the second time, could

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you, if you thought the facts and circumstances warranted it, assess the minimum punishment of five years?

"A. If there were facts to warrant it. Yes. I'm sorry. In my mind, I don't see facts that could make it so. But if there were, yes. Then I could consider it."

Thereafter, appellant's counsel sought to get the venireperson to state whether she would assess the minimum punishment for six convictions (R. 1292, line 21 to R. 1293, line 7, quoted at page 142 of appellant's brief):

"BY MR. GRAY:

"Q I'm not asking you about this case, ma'am. I'm asking you about a hypothetical case where you found a hypothetical defendant guilty of the offense of murder with malice aforethought in six individual cases.

"THE COURT: Sustained.

"MR. GRAY: I haven't finished my question, yet, Your Honor. May I conclude my question?

"THE COURT: Well, what you have said so far is objectionable.

* * * * *

Here the question obviously was objectionable because there is no possible circumstance under which a jury can give one punishment for six cases.

Whether or not to cumulate punishment simply is not a function of the jury, the statute expressly making it within the discretion of the court, Art. 42.08 C.C.P.; Johnson v. State, 492 S.W.2d 505.

(ROSEMARY TULL)

Mrs. Rosemary Tull, in voir dire (R. 1436 et seq) stated

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clearly, when informed by the court of the burden of proof, presumption of innocence and right of the defense not to testify, as follows (R. 1437, lines 8-21):

"THE COURT: The law is that he presumed innocent.

"MRS. TULL: Right.

"THE COURT: And the State has the burden of establishing guilt to your satisfaction, beyond a reasonable doubt. Your verdict should rest only on the evidence that you hear in the course of the trial.

"MRS. TULL: Right. Okay.

"THE COURT: And not be influenced by anything extraneous to that.

"MRS. TULL: Yes.

"THE COURT: Now, if those instructions are given to you, can you follow all of those?

"MRS. TULL: Yes, sir."

* * * * *

This venireperson at the outset stated she had no conclusion established in her mind as to guilt or innocence that would affect her verdict (R. 1419, lines 16-20).

On examination by the defense she made it clear that she had no firm opinion as to guilt (R. 1434, line 25 to R. 1435, line 8; R. 1436, lines 1 to 4; R. 1436, lines 16-25):

"Q But as I understand it, though you said you have sort of a tentative opinion that he's probably guilty?

"A It's entirely possible. I don't know.

"Q You don't have sufficient opinion then?

"A No. Not a firm opinion. No.

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"Q But you do have some opinion?

"A Yes.

* * * * *

"Q And do you feel that you could, with this opinion that you have, at this time, be an impartial juror?

"A Yes.

* * * * *

"Q And do you feel that you could, with this opinion that you have, at this time, be an impartial juror?

"A Yes.

* * * * *

"Q And then, if a defendant in a criminal case or if a defendant did not put on any evidence to remove this opinion, you have now, you would find him guilty; if would not change your present opinion if he didn't unless he put on some evidence?

"A Maybe it's not a case of evidence that I would need, maybe a reason rather than evidence; in other words, is that confusing?

"THE COURT: Mrs. Tull --

"MRS. TULL: What's the --

"(The Court here explained the State's burden of proof, the fact that the defense need not put on evcidence. Defendant is presumed innocent, the limitation to evidence as basis for a verdict and that she must be influenced by nothing extraneous.

* * * * *

Then the court asked (R. 1437, lines 19-21):

"THE COURT: Now if those instructions are given to you, can you follow all of those?

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"MRS. TULL: Yes, sir.

* * * * *

Thereafter, the defense questioned Mrs. Tull with this result (R. 1438, line 19 to R. 1439, line 7):

"A Well, no. I don't think I mean to say that. I meant to say that nothing can be completely forgotten from what you have already learned or heard is what I am basically saying.

"Q And that goes for the opinion that you have at this time about this case and about this defendant?

"A No. Not necessarily. Because my opinion isn't that firm.

"Q But you do have some opinion?

"A Yes, sir.

"Q And that opinion is that he is probably guilty?

"A Possibly. Yes.

"MR. GRAY: We challenge, Your Honor.

"THE COURT: That will be overruled.

"Mr. Gray: Note our exception.

* * * * *

Thereafter, the defense made the following inquiry (R. 1439, line 16 to R. 1440, line 3):

"BY MR. GRAY:

"Q. Mrs. Tull, you will agree with me that any opinion, whether it's a tentative opinion or a firm opinion is based on some sort of facts, isn't it?

"MR. LAMBRIGHT: Objection. That's repetitious.

"THE COURT: Sustained. Go to something else, Mr. Gray. Your challenge has been overruled in that area. Go ahead.

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"MR. GRAY: Note our exception, Your Honor. May we have her answer for a Bill of Exception?

THE COURT: You have her answer, several times already.

* * * * *

Patently, the court and the defense had questioned this venireperson at length, had plainly found from her that she had no opinion that would influence her verdict, that she would confine her verdict to evidence she heard and that she did not know as to appellant's guilt, but he might possibly be guilty.

Certainly, the defense is not entitled to jurors who believe it is not possible that the defendant is guilty. It is an impartial jury which is required, Art. 1 Sec. 10, Texas Constitution, Vernon's Ann. Tex. Const., and numerous annotations at note seven thereunder.

JUSTIN SCHLEPER

Justin Schleper stated promptly and simply that he could consider assessing the minimum punishment of five years if he thought the facts and circumstances warranted that minimum punishment (R. 1748, line 17).

Thereafter, the following occurred (R. 1749, line 19 to R. 1750, line 21):

"BY MR. GRAY:

"Q In other words, it's striclty up to the jury. If they think the facts and circumstances warrant five years, they can assess five or ten or fifteen or whatever.

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"A Yes.

"Q Do you feel, sir, that one of the basic fundamental purposes of punishment is the eventual rehabilitation of the offender so he can be returned to society and be a productive member of that society?

"A That's questionable.

"Q In what way?

"A Well, if a person was proven guilty, beyond any doubt and had committed numerous murders or something, I question whether he should be turned back out into society.

"Q Well, do I take it, sir, that under those circumstances, you would consider no punishment other than the maximum range of punishment?

"MR. LAMBRIGHT: Your Honor, I am going to object to this line of questioning. It's in the Court's charge that this matter is not within the province of the Jury, but within the province of the Board of Pardon and Paroles and the Governor.

"THE COURT: That will be sustained.

"MR. LAMBRIGHT: Thank you.

"MR. GRAY: May we have his answer for our Bill of Exception, Your Honor?

"THE COURT: No.

"MR. GRAY: Note our exception.

* * * * *

Appellant now claims that the court would not let him determine if Mr. Schleper would consider any punishment less than the maximum.

Clearly, here, the defense was attempting to require an advance commitment from the venireperson as to the basis

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on which he would determine punishment, and he was not entitled to this. The defendant may not propound to the venireperson questions that tend to commit him in detail to any course of reasoning in advance of his selection, Barry v. State, 305 S.W.2d 580.

Mr. Schleper had made it clear that he would consider the minimum, under defense questioning.

(WALTON THEIS)

Walton Theis, after being informed by the court that the jury must not consider it as any evidence against the defendant if he does not choose to testify, made it clear that he could follow such an instruction (R. 823, lines 9-23).

Appellant, at page 15 of his brief, now cites from his Exhibit J at the motion for new trial, this quotation from the San Antonio Light of July 17, 1974:

> "Theis, a 49-year old carpenter, said he too was jolted by some of the revelations, but also said, 'I was shocked there was not any defense testimony.'"

Patently, the defense knew of this statement at time of the hearing on motion for new trial, since that is when this exhibit was put in evidence.

It is not conceivable that the diligent defense counsel failed to determine whether there was any consideration by the jury of the defendant's failure to testify, because that would have been clear reversible error properly brought out at motion for new trial.

There is no support in the record for the claim now

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made for the first time that Mr. Theis, foreman of the jury, "could not and did not" follow the law applicable to a defendant's failure to testify.

(EDWARD GREEN)

Appellant claims (page 152 of his brief) that "some or all" of his challenges of venireperson Edward Green (voir dired at R. 1583-1626) should have been granted.

This simply is not an assignment of error, Phillips v. State, 511 S.W.2d 22, and cases there cited.

At R. 1625, lines 11 to 20, Mr. Green made it clear that he would acquit if he had a reasonable doubt as tc guilt. Thereafter the defense made no further inquiry of him.

(BILLIE ROCK)

Billie Rock clearly stated that he would require the State to prove the identity alleged as to deceased beyond a reasonable doubt, and would vote to acquit if the deceased could not be identified, (R. 1574, line 13 to R. 1576, line 23) as follows:

"BY MR. GRAY:

"Q . . . My last question was: suppose the proof shows that the person killed is unidentified and nobody knows who he was. Now, you said under those circumstances, as I understand, and as I understood you, that you could not give the defendant the benefit of the reasonable doubt and find him not guilty; did I understand you to say that?

"A Let me get this a little clearer and I might--

"Q Yes.

"A I might not have understood your question

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correctly. Now, in other words, he's accused of killing Cobble. Let's say. But the man that they prove -- well, the man that they proved he killed is unidentifiable.

Q Yes, sir.

A And they are not sure that he's Cobble.

Q Yes. You have a reasonable doubt?

A Yes, sir.

Q As to whether it's Mr. Cobble or not?

A Yes, sir. If they don't prove that the person he killed was that person, then I do have a reasonable doubt. I misunderstood your question. I did not have it straight what you were saying.

THE COURT: Would you resolve that doubt in favor of the defendant and find him not guilty?

MR. ROCK: Yes, sir. If they didn't prove that he had killed and definitely proved that he had killed that person.

THE COURT: The challenge is overruled.

MR. GRAY: Note our exception.

BY MR. GRAY:

Q Then, going back to what I asked you earlier. Then, the fact that perhaps the defendant could not later be prosecuted for the killing of this unidentified person, you said that you would take that into consideration and that was one of the factors that would forbid you from finding the defendant not guilty. Now, was I mistaken in that?

MR. LAMBRIGHT: Your Honor, we are going into a question of law. Maybe some question about jeapordy (sic) there. I am going to object to him asking the gentleman to draw a conclusion of law. And it's repetitious.

THE COURT: I think it may be repetitious. Mr. Rock, the State is required to prove the

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material allegations in the indictment. And if they name a deceased, that is a material allegation. Now, if they do not prove to your satisfaction, beyond a reasonable doubt that the deceased is the person named --

MR. ROCK: Yes.

THE COURT: -- whether they prove he's somebody else or whether they don't prove he's anybody, if you have a reasonable doubt in your mind, it's your duty as a Juror to resolve that doubt in favor of the defendant.
Now, will you be able to do that?

MR. ROCK: Yes, sir.

THE COURT: You may question about something else.

* * * * *

Clearly this juror was intending to acquit if he had a reasonable doubt as to identity of the victim. Appellant's claim of error has no factual support in the record.

Appellant incorrectly claims, as to these six grounds of error, that there is reversible error under Wolfe v. State, 178 S.W.2d 274 at 281; Clem v. State, 314 S.W.2d 579; and Reich v. State, 251 S.W. 1072 at 1073.

It appears to be his theory that he was prevented from questioning Balzen, Tull, Schleper and Rock relating to his use of peremptory challenges, and required to use peremptory challenges on Balzen, Schleper and Green, when they had been shown to be subject to a challenge for cause.

This simply is not so.

As above shown in discussion of them individually, there was no showing of cause to challenge as to Balzen, Schleper and Green.

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There was no denial of information for use as to peremptory challenges, as to Balzan, Tull, Schleper and Rock.

If there had been any such error, appellant did not, as he now claims, come within the rule of Wolfe v. State, 178 S.W. 2d 274, 281.

He seems to rationalize that after he moved for ten additional peremptory challenges at close of voir dire (with no reasons therefor then set forth), and then set forth ten venirepersons objectionable to him, he came within the Wolfe supra, rule by peremptorily excusing ten other venirepersons.

Clearly this is not within the Wolfe case.

In the Wolfe case, 178 S.W. 2d 274, the venireman who was challenged for cause and not excused for cause was the foreman of the grand jury which had indicted Wolfe.

Wolfe was followed in Salazar v. State, 193 S.W.2d 211. The venireman there challenged for cause and not excused for cause had said he would require more evidence on the part of the accused to justify a defense where the accused was an officer than it would if he were a private citizen.

In each case, the defense used a peremptory challenge because of a wrongful denial of a challenge for cause.

There is simply no such showing here.

The grounds of error 17 to 22 inclusive are without merit.

REPLY TO POINTS OF ERROR

TWENTY-THREE TO TWENTY-SEVEN INCLUSIVE

These five points of error read as follows:

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" POINT OF ERROR NO. TWENTY-THREE"

" Appellant was denied his right to a public trial, guaranteed by Article 1, Section 10, Vernon's Ann. Texas Constitution, where the trial court barred the press and the public from the courtroom during the voir dire of the first twenty-three venirepersons.

"POINT OF ERROR NO. TWENTY-FOUR"

"Appellant was denied his right to a public trial, authorized by Article 1.05, Vernon's Ann. Code of Criminal Procedure, where the trial court barred the press and the public from the court-room during the voir dire of the first twenty-three venirepersons.

"POINT OF ERROR NO. TWENTY-FIVE"

"Appellant was denied his right under Article 1.24, Vernon's Ann. Code of Criminal Procedure, that the proceedings and trial be public, where the trial court barred the press and the public from the courtroom during the voir dire of the first twenty-three venirepersons.

"POINT OF ERROR NO. TWENTY-SIX"

"Appellant was denied his right under the Sixth and Fourteenth Amendment to the Constitution of the United States to a public trial, where the trial court barred the press and the public from the courtroom during the voir dire of the first twenty-three venirepersons.

"POINT OF ERROR NO. TWENTY-SEVEN"

"Appellant was denied his right to a public trial, guaranteed by the Texas and United States Consti - tutions where the court refused, over timely objection, to remove venireman Walton Theis from the panel."

In these five points of error appellant claims he was denied his right to a public trial, asserting that the press and the public were barred from the courtroom during the voir dire of the first 23 venirepersons questioned.

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At request of the defense, the court deviated from the statutory method of jury selection, in order to prevent the venirepersons from influencing each other when questioned as to their opinions, if any, as to the cases at trial (R. 738, line 11 to R. 739, line 6; R. 762, lines 2-7; R. 762, line 24 to R. 763, line 2).

The procedure set up was to hold court for voir dire in the grand jury room of the Bexar County Courthouse, to which the court adjourned. It is across the hall from the Central Jury Room, where the panel was located. Tables were set up for counsel in the grand jury room, and the venirepersons were brought in one at a time (R. 774, lines 18-21; R. 775, lines 22-25). Everyone seemed agreeable to this. No one objected, and the objective was to implement the request of the defense.

The court, in its effort to reduce the news coverage about which appellant now complains in his first 15 points of error, declined to allow, at the voir dire, the news media and general public, including a parent quoted as forecasting appellant's assassination (pages 58-59 of appellant's brief).

This seems at first to have pleased everyone, but at R. 861, line 14 to R. 862, line 8, after one possible juror, i.e., Walton Theis (R. 824-847) had been qualified, and after a number had been exempt or excused, the appellant objected, complaining that exclusion of news media and general public violated his rights under the Sixth Amendment to the United

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States Constitution.

This was overruled (R. 862, line 2).

Later, after qualification of two more venirepersons, appellant moved to have the hearing on jury selection in the courtroom (R. 915, lines 22-25). Still later an objection was made complaining of the procedure generally and specifying statutory rights. On inquiry by the court, appellant still wanted to examine each venireperson apart from the rest of the panel (R. 940-941), rather than using statutory procedure.

The next day, for the first time, appellant moved for a mistrial, claiming that he had been deprived of a public trial under the Sixth Amendment and to quash the entire jury panel (claiming news media and general public were not present when it was impanelled). These motions were denied (R. 1040).

Appellant then asked for the eight venirepersons who were selected the first day to be excused, which was denied (R. 1040-1041).

On July 5, 1974, the court (R. 1873-R.1874) gave the defense the opportunity to again urge its objection to the seven venirepersons who were qualified in the grand jury room after the defense objected to that procedure. The court promised to excuse them if such an objection was made, and also offered to allow the defense to retain any of these prospective jurors they wished to retain by waiver of the objection to them (R. 1877).

Appellant moved to quash these seven persons who had qualified as possible jurors, and the motion was granted (R. 1878, lines 17-21).

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The court denied a motion to quash all eight venirepersons, including Mr. Theis, who was qualified before any objection was made to the procedure which had been designed to accommodate the defense (R. 1880).

The court ruled that the defense had waived this objection as to Mr. Theis (R. 1880, lines 20-25).

Appellant cites authorities holding that it is error, with harm presumed, not to comply with the statutory procedure when it is demanded, Fontenot v. State, 378 S.W.2d 334, which quotes 1 Branch 2d § 543 as follows:

> "An infringement of the jury law will require a reversal without reference to whether injury to the defendant is shown. When the statute prescribes the method of procedure and compliance therewith is promptly and timely demanded, the trial court is not authorized to permit infringements of the jury law." [Emphasis added]

Here the defense asked that the court depart from the statutory procedure, expressly stated, even when objecting, that it did not want the statutory procedure followed (voir dire of the panel in one room at one time) and had made no objection at all prior to the qualification of Mr. Theis.

Clearly, by appellant's own authorities, this claim of error is without merit.

Further, as was noted in Price v. State, 496 S.W.2d 103, cited by appellant, there is no showing of harm.

Here, for three reasons independently sufficient, the claim of error is without merit:

(1) Departure from statute was at request of the defense.

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(2) All venirepersons selected in the procedure after objection was made were excused; and

(3) No demand for statutory procedure to be followed ever having been made, harm must be shown and none was shown.

REPLY TO POINTS OF ERROR TWENTY-EIGHT AND TWENTY-NINE

These grounds of error claim, incorrectly, that the trial court conveyed to the jury his opinion of the merits of the case.

The instruction here complained of is as follows (R. 561-562, paragraph 9-a):

> The State has the burden of proving the defendant guilty beyond a reasonable doubt in each individual case before the jury would be permitted to return a verdict of guilty in that particular case. You are instructed that you cannot consider evidence of the defendant's guilt of one or more of the offenses charged by indictment as evidence of his guilt of any other offenses charged. If there is any evidence of offenses other than those offenses for which the defendant is charged by indictment, you cannot consider such evidence as establishing the guilt of the defendant for any offense with which he is charged by indictment.
>
> * * * * *

The above instruction is incorrectly copied at page 174 of appellant's brief, apparently by clerical error.

Appellant asserts that the second sentence in the above quoted paragraph 9-a is a comment on the weight of the evidence under Art. 38.05 C.C.P.

The court included in his instructions the following, at R. 563, paragraph 13:

"You are the exclusive judges of the facts

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proven, of the credibility of the witnesses and of the weight to be given the testimony but the law of the case you must receive from the Court as contained in these instructions, and be governed thereby. You must disregard, any comment or statement made by the Court during the trial or in these instructions which may seem to indicate an opinion with respect to any fact, item of evidence or verdict to be reached in this case. No such indication was intended." (Emphasis added)

* * * * *

Appellant here attempts to equate paragraph 9-a, above, with United States v. Martinez (U.S.C.A. 5th, 1974) 496 F.2d 664, where the Court said, "I think you might reasonably find that the offense has been proved."

There simply is no similarity.

Here three rules, each independently sufficient, make the claim one without merit.

First, the court cured any error, if any existed, by its instruction disclaiming any intent to comment on the weight of the evidence and ordering the jury not to consider anything the court said as an opinion with respect to any fact, item or evidence or verdict to be reached.

Similar disclaimer instructions were approved in Cline v. State, 463 S.W.2d 441; Lee v. State, 454 S.W.2d 207; Jones v. State, 290 S.W.2d 671; Chevallier v. State, 404 S.W.2d 46; Estrada v. State, 422 S.W.2d 453.

Second, the charge must be considered in its entirety and any error in an instruction is deemed cured if it appears, on consideration of the entire charge, that the law is correctly stated, 31 Tex. Jur. 2d Instructions Sec. 94 at n. 1.

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This rule applies to comment on the weight of the evidence, 31 Tex. Jur.2d Instructions § 95 at n. 20.

When this is done there simply is no comment on the weight of the evidence.

Third, there was no objection as now made at time of trial. The objection simply claimed generally that the whole numbered paragraph was a comment on the evidence. No mention was made to convey the claim now made that the second sentence of this paragraph implied that the court believed there was evidence of appellant's guilt in at least one of the cases.

The objection made by appellant at trial is paragraph 25 at R. 555-556, and reads as follows:

> Defendant objects to numbered paragraph Nine-A (9-a) wherein the court instructs the jury that "You cannot consider evidence of defendant's guilt of one or more of the offenses charged by indictment as evidence of his guilt of any other offenses charged because this constitutes a comment on the evidence.

Further, the objection does not in any way state why the instruction is claimed to be a comment on the evidence, and it does not assert that there is a comment on the weight of the evidence - merely "on the evidence."

If there were a comment on the weight of the evidence, this would not preserve it for review.

An objection to the charge must be specific, Mutscher v. State, 514 S.W.2d 905 at 923-924.

Point of Error Twenty Nine is without merit.

REPLY TO POINTS OF ERROR
THIRTY TO THIRTY-FIVE INCLUSIVE

Appellant's Points of Error Thirty to Thirty-Five,

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pages 177-178 of his brief, read as follows:

POINT OF ERROR
NO. THIRTY

The trial court erred in overruling appellant's objection to the court's charge for its failure to properly and adequately limit the jury's consideration of any specific offense.

POINT OF ERROR
NO. THIRTY-ONE

The trial court erred in overruling appellant's objection to the court's charge for its failure to limit the jury's consideration of evidence of extraneous offenses, particularly that relating to the twenty-two (22) homicides in which the defendant was not charged or indicted.

POINT OF ERROR
NO. THIRTY-TWO

The trial court erred in overruling appellant's objection to the court's charge for its failure to limit the jury's consideration of evidence relating to Dean Corll's alleged disposition of stolen property taken from victims not named in defendant's indictments.

POINT OF ERROR
NO. THIRTY-THREE

The trial court erred in overruling appellant's objection to the court's charge for its failure to limit the jury's consideration of the evidence relating to the extraneous offense arising from appellant's shooting of Dean Corll.

POINT OF ERROR
NO. THIRTY-FOUR

The trial court erred in overruling appellant's objection to the court's charge for its failure to limit the jury's consideration of extraneous offenses relating to Timothy Kerley and Rhonda Williams.

POINT OF ERROR
NO. THIRTY-FIVE

The trial court erred in overruling appellant's objection to the court's instructions to limit the purpose for which the jury might consider evidence of extraneous offenses.

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Appellant now makes each of these claims for the first time.

The court charged the jury as follows (R. 561-2, paragraph 9-a):

> The State has the burden of proving the defendant guilty beyond a reasonable doubt in each individual case before the jury would be permitted to return a verdict of guilty in that particular case. You are instructed that you cannot consider evidence of the defendant's guilt of one or more of the offenses charged by indictment as evidence of his guilt of any other offenses charged. If there is any evidence of offenses other than those offenses for which the defendant is charged by indictment, you cannot consider such evidence as establishing the guilt of the defendant for any offense with which he is charged by indictment.
>
> * * * * *

This instruction is comparable to the instruction at Willson's Texas Criminal Forms, Seventh Edition, which limits the consideration thereof "if there is any evidence before you. . .tending to show that the defendant, A.B., committed acts other than the offense alleged. . ." The charge in the case at bar, however, excludes completely consideration of such acts, instead of merely limiting the purposes for which they can be considered.

Appellant objected generally that this did not limit the jury's consideration of specific offenses (R. 556, paragraph 26). He did not make the specific complaints that he now makes.

The objections to the court's charge must be specific, Mutscher v. State, 514 S.W.2d 905 at 923-924.

The complaint on appeal must be the same made at time of trial, Simpson v. State, 507 S.W.2d 530; Campbell v. State,

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521 S.W.2d 636; Cox v. State, 523 S.W.2d 695.

Thus these points of error as to these six specific offenses are not preserved for review.

However, if they were preserved for review, they are without merit.

The many extraneous offenses which were mentioned during appellant's trial of the six murders for which he was indicted, were admissible, Robbins v. State, 387 S.W.2d 62; McCoy v. State, 162 S.W.2d 976, as being so interwoven with the said six murders that mention of them could not have been deleted and leave intelligent testimony as to the six.

The jury does not have to function in a vacuum, Albrecht v. State, 486 S.W.2d 97.

As has been shown, the court charged the jury not to consider any evidence of any extraneous offense on the issue of guilt or innocence in each case at bar.

The rule here applicable is that a complaint or request seeking an instruction not to consider extraneous offense or offenses, must specify which offenses, Walker v. State, 440 S.W.2d 653 at 660. Here, there are no specific extraneous offenses set out, and no specific act mentioned, except the shooting of Dean Corll.

The charge given by the court correctly removed any evidence relating to any such offenses from consideration, in establishing appellant;s guilt in the murders for which he was on trial.

As to evidence of the shooting of Dean Corll in self defense and in defense of Rhonda Williams and Timothy Kerley,

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there simply is no offense by appellant here shown. That patently was a justifiable homicide, Secs. 9.31, 9.32 and 9.33 P.C. and Art. 1142, Arts. 1207. 1221, 1222, 1225, and 1226 of the Penal Code of 1925.

Points of error Thirty to Thirty-five inclusive are without merit.

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